2006

State of Utah v. Devon Kinne, Franklin Eric Halls : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Respondent,	:	
v.	:	**Consolidated Supreme Case No.:**
DEVON KINNE,	:	**20060508-SC**
Petitioner.	:	
STATE OF UTAH,	:	
Respondent,	:	
v.	:	
FRANKLIN ERIC HALLS	:	
Petitioner.	:	

REPLY TO BRIEF OF PETITIONERS KINNE AND HALLS

THIS IS A CONSOLIDATED APPEAL ON GRANT OF CERTIORARI FROM AN OPINION AND MEMORANDUM DECISION ENTERED BY THE UTAH COURT OF APPEALS IN TWO SEPARATE CASES

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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REPLY BRIEF OF PETITIONERS KINNE AND HALLS

ARGUMENT

I. THE STATE'S RETROACTIVITY/PRESERVATION ARGUMENT FAILS.

In the *Brief of Respondent*, the State indicates its position that the case of State v. Reyes, 2005 UT 33, 116 P.3d 305, is retroactive under federal law to the petitioners cases in this matter, but that State preservation rules apply to federal claims and preservation was thus required in each of the petitioners' cases. *Brief of Respondent* at p. 13.

A. This Court Need Not Determine the Retroactivity of Reyes.

Exceptional circumstances are explained as "those which would explain and excuse a party's failure to raise a claimed error in the trial court." State v. Webb, 790 P.2d 65 (Utah App.1990). "The exceptional circumstances concept serves as a 'safety device,' to assure

that manifest injustice does not result from the failure to consider an issue on appeal." State v. Archambeau 820 P.2d 920, 923 (Utah App. 1991).

> Unlike "plain error," "exceptional circumstances" is not so much a precise doctrine, which may be analyzed in terms of fixed elements, as it is a descriptive term used to memorialize an appellate court's judgment that even though an issue was not raised below and even though the plain error doctrine does not apply, unique procedural circumstances nonetheless permit consideration of the merits of the issue on appeal.

State v. Irwin, 924 P.2d 5 (Utah App. 1996). In State v. Lopez, 873 P.2d 1127, (Utah 1994), this Court employed the "exceptional circumstances" rubric where a change in law or the settled interpretation of law colored the failure to have raised an issue at trial.

This Court need not determine the retroactivity of the change of law set forth in Reyes since the preservation of the issue rises to an exception under the well-settled "exceptional circumstances" rubric here in Utah. Such a determination could potentially open the flood gates to allow all who previously adhered to State v. Robertson, 932 P.2d 1219 (Utah 1997) from 1997 to 2005 to file petitions under the Act. Such a determination, however, is unnecessary in this matter since the issue of retroactivity does not apply to Kinne and Halls, whose trials occurred prior to Reyes, and whose appeals occurred subsequent to Reyes, constituting a clear case for exceptional circumstances to apply.

B. Retroactivity Does Not Require Preservation, but Clearly Dictates an Exception to the Preservation Rule.

UTAH CODE ANN. §78-35a-104(2), which is contained in the Post-Convictions Remedy Act, encompasses the retroactivity rule here in Utah when it states that, "[t]he

question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity." Relief is specifically excluded under the Post-Convictions Remedy Act, however, as follows:

> (1) A person is not eligible for relief under this chapter upon any ground that:
>
> (a) may still be raised on direct appeal or by a post-trial motion;
> (b) was raised or addressed at trial or on appeal;
> (c) could have been but was not raised at trial or on appeal;
> (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
> (e) is barred by the limitation period established in Section 78-35a-107.

UTAH CODE ANN. §78-35a-106. Thus, the retroactivity rule pronounced at §78-35a-104(2), as it pertains to changes in law promulgated by an appellate court with authority in Utah clearly is reserved for those(a) who had the change of law occur after their conviction; (b) who could not raise the issue on direct appeal; and (c) whose conviction is final.

In Griffith v. Kentucky, the United States Supreme Court specifically addressed the State's argument as to whether a change in law occurring between an individual's trial and appeal should be entertained by the trial courts, as follows:

> In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. First, it is a settled principle that this Court adjudicates only "cases" and "controversies." See U.S. Const., Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional

criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review. Justice Harlan observed:

> "If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all···· In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Mackey v. United States*, 401 U.S., at 679, 91 S.Ct., at 1173 (opinion concurring in judgment).

As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *Ibid.* See *United States v. Johnson*, 457 U.S., at 546-547, 555, 102 S.Ct., at 2585, 2590.

Second, selective application of new rules violates the principle of treating similarly situated defendants the same. See *Desist v. United States*, 394 U.S., at 258-259, 89 S.Ct., at 1038-1039 (Harlan, J., dissenting). As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis in original). Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: "The time for toleration has come to an end." *Ibid.*

In *United States v. Johnson*, our acceptance of Justice Harlan's views led to the holding that "subject to [certain exceptions], a decision of this Court construing the Fourth Amendment is to be applied retroactively to all

> convictions that were not yet final at the time the decision was rendered." *Id.*, at 562, 102 S.Ct. at 2593.

Ibid., 479 U.S. 314, 322-324, 107 S.Ct. 708, 713, 93 L.Ed.2d 649 (1987). The Griffith v. Kentucky decision determined that this type of "retroactivity" should apply to "to all similar cases pending on direct review." The Griffith v. Kentucky holding is upheld by Utah's exceptional circumstances rubric and is directly in line with the Utah Legislature's promulgation of the Post-Convictions Remedy Act.

The State's position that the invited error doctrine applies or that State preservation rules should bar consideration of claims such as raised by the Appellants herein necessarily creates "'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." Griffith 479 U.S. at 323, 107 S.Ct. at 713, *citing* Johnson, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis in original). This Court's Reyes decision informed Reyes, Cruz and Weaver that the holding in Robertson was flawed and that they were thus not entitled to the benefit of the phrase at issue herein. While the determination indirectly affected Reyes, Cruz and Weaver by simply determining their lack of entitlement, Kinne and Halls are directly affected in that the substantial risk this Court discovered in Reyes exists in their respective cases. The phrase at issue cannot be flawed for Reyes, Cruz and Weaver, but acceptable for Kinne and Halls under the simple doctrine of equity, particularly when this Court determined that the phrase violates Victor standards, which are the guidelines to follow after this Court's abandonment of Robertson.

"The purpose of this [preservation] rule is to allow the trial court the first opportunity to address a claim that it has erred." State v. Rangel, 866 P.2d 607, 611, (Utah App. 1993) *citing* State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991). The State attempt to circumnavigate the holdings in Griffith by laying claim that a retroactive rule need be preserved under State laws governing preservation; however, the State's analysis does not include any authority for this position. Regardless, the State's argument fails based on the fact that the retroactive rule circumvents the preservation rule by specifically stating that, ". . .failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Griffiths, 479 U.S. at 322, 107 S.Ct. at 713. The United States Supreme Court also sets forth its authority to dictate such a holding to the State courts by stating that, ". . .we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id.* The United States Supreme Court has held that it will not tolerate such an inequity to occur. *Id.*, 479 U.S. at 324, 107 S.Ct. at 713. Hence, a determination that the retroactivity rule applies is an exception to the preservation of the issue as held by the United State Supreme Court in Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997), that "...where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that an error be 'plain' at the time of appellate consideration." *Id.*

Alternatively, should this Court determine that State preservation rules apply, even in light of a determination of retroactive application, a decision to require the trial court to

hear the matter first prejudicially forecloses remedy for Kinne and Halls although it allows those whose appeals have been finalized to petition for remedy. A change in law that is constitutional does not fall under the remedies set forth in UT. R. CIV. P. 59 or 60 for obtaining either relief from the judgment or a new trial. The only remedy is thus found in the Post-Convictions Remedy Act either by filing a petition for extraordinary relief under Ut. R. Civ. P. 65C or a writ of habeas corpus. Unfortunately, as mentioned *supra*, such a remedy does not exist for Kinne and Halls.

UTAH CODE ANN. 78-35a-104(1)(a) sets forth that a challenge for obtaining a post-conviction remedy includes a conviction that was obtained in violation of the United States or Utah Constitutions. As articulated in Appellants' opening briefs and conceded by the State, the change in Reyes is necessarily constitutional since it potentially diminishes the degree by which a juror may have found a criminal defendant guilty. Although Kinne and Halls' cases meet this criteria and could potentially obtain relief under these provisions, UTAH CODE ANN. §§78-35a-102 and -106 preclude them from doing so. The Post-Convictions Remedy Act requires exhaustion of all other remedies under §78-35a-102, and specifically *requires* raising the issues on direct appeal if the conviction is not yet final under UTAH CODE ANN. §§78-35a-106.

Kinne and Halls are precluded from filing under the Act under UTAH CODE ANN. 78-35a-106(1)(a) since they could still raise the issue on direct appeal after Reyes came down. Interestingly, that is exactly what Kinne and Halls did to preserve their challenge. Had they

chosen not to raise it on direct appeal, they would have been precluded from filing under the Act under subsection (1)(c) since it could have been raised but was not. Basically, the issue for Kinne and Halls was properly raised on direct appeal according to the provisions of the Act because they were still able to do so when Reyes came down. If this is the case, then some exception to the preservation requirement must exist. The exceptional circumstances rubric exists as that exception and has been routinely applied in circumstances similar to this, where the law changed between the time of trial and time of appeal.

Additionally, a decision from this Court affirming the Utah Court of Appeals could potentially foreclose Kinne and Halls from raising the matter in any post-judgment petitions on the basis that the claim has already been determined by the Utah Court of Appeals. UTAH CODE ANN. 78-35a-106(1)(b). However, the Utah Court of Appeals in essence declined to address the issue, erroneously applying an incorrect exception. Thus, Kinne and Halls would not have a remedy in filing a post-judgment motion after such a decision by this Court.

Should this Court determine that the Utah Court of Appeals correctly applied the plain error doctrine rather than exceptional circumstances rubric, Kinne and Halls will be precluded from obtaining a remedy available to all others who have exhausted their direct appeals prior to the Reyes determination being handed down, under a retroactivity argument thus unavailable to Kinne and Halls because of the fact that their trials occurred before Reyes and their appeals occurred after it. This is the entire purpose behind the appellate courts' application of the exceptional circumstances rubric for times when the law clearly changes

after the time of trial but before an appeal. The only viable answer is to find that exceptional circumstances apply.

If this Court were to rule that Reyes should be applied retroactively it would open the flood gates for anyone who had been convicted under Robertson which was precedent for over nine (9) years, to now bring an action to set aside their judgments because Reyes overruled Robertson and is being applied retroactively. The State acknowledges this point in the *Brief of Respondent* at p. 8. However, anyone with a case pending on direct review when this Court issued its decision in Reyes should be allowed to benefit from the change in the law.

Retroactive application of new laws occurs to protect the rights of those who have previously been held to the now-abandoned holdings. In the instant matter, many people have been subjected to reasonable-doubt jury instructions under State v. Robertson, 932 P.2d 1219 (Utah 1997) *overruled in relevant part by* State v.Reyes, 2005 UT 33, 116 P.3d 305, which led to the substantial risk that they were found guilty based upon a standard that is lower than that of "beyond a reasonable doubt." Allowing Reyes to be applied retroactively would allow every person ever convicted under a reasonable-doubt jury instruction as set forth in Robertson to file post-judgment motions for relief. This would not allow for the efficient administration of justice because courts would be inundated with people asking for their cases to be reviewed based upon the retroactivity of Reyes. Therefore, this Court should decline to address the retroactivity of the holdings in Reyes..

The exceptional circumstances rubric should be applied to the instant matter. Exceptional circumstances are explained as "those which would explain and excuse a party's failure to raise a claimed error in the trial court." State v. Webb, 790 P.2d 65 (Utah App.1990). In State v. Lopez, 831 P.2d 1040 (Utah App.1992), the Utah Court of Appeals employed the "exceptional circumstances" rubric where a change in law or the settled interpretation of law colored the failure to have raised an issue at trial.

II. THE INVITED ERROR DOCTRINE DOES NOT APPLY.

In the *Brief of Respondent,* the State argues that Kinne and Halls did not preserve the issue of the reasonable doubt jury instruction and that the invited error doctrine bars them from obtaining relief on appeal. *Brief of Respondent* at p. 16.

A. The Issue of Invited Error is Not Properly Before This Court.

Appellants respectfully request that this Court decline to address the State's "invited error doctrine" argument set forth in their brief at pp. 16-20 since the question is not properly before this Court. The question upon which this Court granted certiorari is whether the Utah Court of Appeals erred in reviewing the decisions challenged herein for "plain error." The State has not properly challenged the issue, by cross-petition, that the Utah Court of Appeals erred by not applying the "invited error doctrine." Thus, their claim should be barred.

B. Alternatively, the Invited Error Doctrine Does Not Apply to Cases Where A Change of Law Occurred Between Trial and Appeal.

To the extent that this Court determines that the granting of certiorari on whether the Reyes determination constituted "reversible error" authorizing the "invited error doctrine" argument raised by the State, Kinne and Halls address the issue herein below.

"The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error." U.S. v. Edward J., 224 F.3d 1216, C.A.10, 2000, *citing* United States v. Johnson, 183 F.3d 1175, 1178 n. 2 (10th Cir.1999). "We have held repeatedly that on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error."State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993). There we explained that this rule, known as the "invited error" doctrine, serves two purposes. "First, it fortifies our long-established policy that the trial court should have the first opportunity to address the claim of error. Second, it discourages parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal." *Id.* State v. Anderson, 929 P.2d 1107, (Utah,1996) *citing* State v. Dunn, 850 P.2d 1201 (Utah 1993). "While the invited error doctrine is crafted to " 'discourage [ ] parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal,' " it is also intended to give the trial court the first opportunity to address the claim of error." State v. Geukgeuzian 2004 UT 16 ¶12, 86 P.3d 742, *quoting* State v. Hamilton, 2003 UT 22, ¶ 54, 70 P.3d 111 (*quoting* State v. Anderson, 929 P.2d 1107, 1109 (Utah 1996) (further citation omitted).

Although it appears Utah appellate courts have not specifically addressed the issue of invited error as it pertains to unsettled areas of law, federal caselaw provides guidance. The federal courts have expanded upon the concept of exceptional circumstances to include a "plain error" concept *at the stage of appeal.* The United States Supreme Court explained in Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997), that "...where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that an error be 'plain' at the time of appellate consideration." *Id.* The United States Supreme Court agreed that the alternative would "...result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Id.*, 520 U.S. at 468, 117 S. Ct. at 1549. United States v. Retos, analyzed this issue and explained that the question at issue here is not whether the error was plain at time of trial, but whether it is plain *based on current law at the time of direct appeal.* 25 F.3d 1220 (3d Cir.1994)(emphasis added). In U.S. v. West Indies Transport, Inc., the Third Circuit Court of Appeals analyzed the doctrine of invited error as it applies to jury instructions and found that "...where a defendant submits proposed jury instructions in reliance on current law, and on direct appeal that law is declared constitutionally infirm, we will not apply the invited error doctrine." 127 F.3d 299 (3rd Cir. 1997). Kinne and Halls respectfully request that this Court similarly decline to apply the "invited error doctrine" to this matter.

The invited error doctrine exists so that a defendant cannot *intentionally* lead a trial court into committing an error and then use the error on appeal to have the conviction reversed. In the instant matter, Kinne and Halls did not, and could not have intentionally invite the error. At the time of their respective trials, no error existed and the reasonable-doubt jury instruction was well-founded upon existing precedent set forth in Robertson. An attorney can only rely on current case law at the time of trial. An attorney cannot be expected to make a long list of objections opposing ideas that are clearly supported by the existing precedent. The invited error doctrine exists to protect from errors that are intentional at the time of trial, not those founded in existing precedent that changes later while their appeal is pending. Kinne and Halls had no control over whether this Court would overturn Robertson thereby rendering the reasonable-doubt jury instruction used at their trial flawed. Since no error existed at the time of trial, they could not invite the error.

III. KINNE AND HALLS' TRIAL COUNSEL DID NOT HAVE A DUTY TO KNOW THAT ROBERTSON WAS VULNERABLE AND MAY BE OVERRULED.

In the *Brief of the Respondent* the State attempts to argue that no exceptional circumstances exist in this matter because trial counsel should have known that Robertson was vulnerable based upon the Utah Court of Appeals decision in State v. Reyes 84 P.3d 841 (Utah App. 2004), which upheld Robertson, but was then pending on grant of certiorari before this Court. *Brief of Respondent* at p. 28.

In the first Reyes matter before the Utah Court of Appeals, the State asked the Court of Appeals to overrule Robertson arguing that the three-part test as set forth by this Court in Robertson was not based on constitutionality and diminished the significance. The Court of Appeals ruled that it did not believe that Robertson was in accordance with the precedence set forth in Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d.583 (1994), but that it did not have the authority to overrule Robertson. It reversed and remanded the matter for a new trial. On May 26, 2004, the State then filed their Petition for Writ of Certiorari challenging the first Reyes decision, which was subsequently granted by this Court.

Although Kinne and Halls' trials occurred after certiorari was granted in Reyes, Kinne and Halls' trial counsels could not have objected and used that information as a basis, since pending cases have no precedential value. Had Kinne and Halls' trial counsels objected based upon a case that was pending in this Court, the trial court would not have delayed the decisions it made at trial in order to see how the appeal in Reyes turned out. The trial court would have likely made the same decisions because, at the time of trial, Robertson was still precedent.

The trial court was not going to predict the outcome of a pending case, supporting the case law from this Court and the Utah Court of Appeals that an individual is allowed to take up on appeal an issue that was created by a change in the law from the time of trial to the time of appeal under exceptional circumstances. "[T]he 'exceptional circumstances' rubric [may be employed] where a change in law or the settled interpretation of law color[s] the

failure to have raised an issue at trial." State ex rel. T.M., 2003 UT App. 191, ¶16, 73 P.3d 959, *citing* State v. Irwin, 924 P.2d 5, 10 (Utah Ct.App.1996). To do otherwise would create the "virtually useless laundry lists of objections" as discussed in Johnson v. United States, 520 U.S. 461, 468 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997). Because pending cases have no precedential value, Austin's trial counsel had no duty to know that Robertson was vulnerable and could possibly be overturned by this Court.

IV. THE ROBERTSON TEST DIMINISHED THE STATE'S BURDEN AND WAS NOT FAVORABLE TO THE DEFENSE

In the *Brief of Respondent*, the State attempts to argue that the three-part test as set forth in Robertson raised the State's burden of proof making it more beneficial to Kinne and Halls than harmful. *Brief of Respondent* at pp. 7-8. In the *Brief of the Respondent* the State also attempts to argue that Robertson is more favorable to the defense. *Brief of Respondent* at p. 30. The State boldly, yet mistakenly takes this position absent supportive case law and analysis. In the process it completely ignores this Court's analysis in Reyes.

In this Court's decision in Reyes it discussed how the Robertson test and the phrase "obviate all reasonable doubt" diminished the state's burden, as follows:

> The process suggested by the "obviate all reasonable doubt" standard is also flawed because, contrary to its purpose, it tends to diminish the degree of proof necessary to convict and in that respect violates the *Victor* standard. The "obviation" of doubt contemplates a two-step undertaking: the identification of the doubt and a testing of the validity of the doubt against the evidence. This process suggests a back and forth disputation of a doubt's merits, all to the end of determining whether the evidence is sufficient to "obviate" the doubt. The "beyond a reasonable doubt" standard does not, however, condition a conclusion that a doubt is reasonable on an ability either to

> articulate the doubt or to state a reason for it. An unarticulated conviction that the State has failed to meet its burden of proof will serve as a legitimate basis to acquit.

Reyes 2005 UT 33, ¶27. If a juror had a doubt and could weigh that doubt against the evidence to determine if the evidence could extinguish the doubt, it would allow the State to have a diminished burden because it would not have to prove the charges "beyond a reasonable doubt." For the State to meet the burden of "beyond a reasonable doubt" a juror cannot have any reasonable doubts. If a juror is allowed to dispute a doubt's merits, then the State has not met their burden of proving the crime "beyond a reasonable doubt." Therefore, Robertson actually diminished the burden of the State in having to prove a crime or act occurred "beyond a reasonable doubt" by allowing a juror to have a doubt and dispute its merits in an attempt to "obviate" it. The Robertson instruction clearly did not raise the burden on the State, as the State would have this Court believe.

In Reyes, this Court articulated that using the phrase "obviate all reasonable doubt" carried with it the substantial risk that a juror could convict someone based upon a standard that was lower than that of "beyond a reasonable doubt." *Ibid.*, 2005 UT 33, ¶30. Creating a substantial risk that an accused could be convicted based upon a standard that is lower than that of beyond a reasonable doubt is not defense favorable because this could allow an accused to be convicted based upon a lower standard. Therefore, Robertson was not defense favorable.

V. EXCEPTIONAL CIRCUMSTANCES DO NOT ENCOMPASS THE PLAIN ERROR STANDARD

In the *Brief of the Respondent* the State attempts to argue that, if this Court finds that exceptional circumstances apply, two of the three prongs of plain error also apply. *Brief of Respondent* at p. 8, 31. The State erroneously attempts to change the exceptional circumstances rubric as it applies in Utah by including two of the three prongs of the plain error standard in an attempt to make it apply. Their argument fails, however, in their concession that one of the prongs clearly cannot apply.

Plain error and exceptional circumstances cannot exist together. "Unlike "plain error," "exceptional circumstances" is not so much a precise doctrine, which may be analyzed in terms of fixed elements, as it is a descriptive term used to memorialize an appellate court's judgment that even though an issue was not raised below and *even though the plain error doctrine does not apply*, unique procedural circumstances nonetheless permit consideration of the merits of the issue on appeal." State v. Irwin, 924 P.2d 5, 8, (Utah App.,1996) (emphasis added). Exceptional circumstances is what exists when the plain error doctrine cannot be met, yet an error still exists, therefore, they cannot exist as one and the same.

"In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." State v. Dunn, 850 P.2d 1201(Utah,1993), *see* State v. Verde, 770 P.2d 116, 122 (Utah 1989);

State v. Bell, 770 P.2d 100, 105-06 (Utah 1988); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987); State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984); *see also* Eldredge, 773 P.2d at 35-36;cf. UTAH R.EVID. 103(d); UTAH R.CRIM.P. 19(c). If any one of these requirements is not met, plain error is not established. *Cf.* State v. Hamilton, 827 P.2d 232, 240 (Utah 1992); Verde, 770 P.2d at 123.

The State concedes in its brief that the second prong of the plain error doctrine cannot be met because the error was not obvious to the trial court. *Brief of Respondent* at p. 31. Because the second prong requires that an error be obvious to the trial court it can never be met in circumstances were there has been a substantial change in the law between the time of trial and the time of appeal since there was no error at the time of trial. The State contends that the first and third prong of the plain error doctrine can still be met, however, as stated above in Dunn, if all three prongs of the plain error doctrine are not met, plain error has not been established.

Not only can the second prong not be meet but neither can the first and third prong of the plain error doctrine. The first prong requires that an error exists at the time of trial, no error existed in this matter at the time of trial. No error existed in these matters until the change in the law under Reyes. The third prong can also not be meet because the harm in this matter is the substantial risk that was created by using the phrase "obviate all reasonable doubt" and it is impossible to see what the potential effects of this phrase had on the juror's minds. Therefore, none of the three prongs of the plain error doctrine can be met in this

matter so exceptional circumstances clearly applies and the trial court erred in making its determinations based upon the plain error standard.

The Utah Court of Appeals applied the Utah plain error doctrine when it rendered its decision in this matter, rather than the Utah exceptional circumstances rubric argued *supra*, or the federal plain error standard on appeal as set forth in Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997). In Johnson, the United States Supreme Court stated, that "...where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that an error be 'plain' at the time of appellate consideration." *Id.* The use of the word "plain" in Johnson does not require an undertaking of Utah's three-prong plain error doctrine. Instead, determining what plain error may exist at the time of appeal requires a two-step undertaking. First, did the law change and, second, did the change in the law create an error. The second prong in Johnson only requires that an error was created based upon a change in the law at the *time of appeal*, not at the time of trial. Because the reasonable doubt jury instruction standard did change between the time of Austin's trial and his appeal and because the change in that law created an error, this error should be reviewed under the Utah's exceptional circumstances rubric and the test as set forth in Johnson. Because the three prongs of Utah's plain error doctrine have not been met, plain error does not exist. Hence, as argued further below, harm is not required to be established.

VI. HARM IS NOT NECESSARY TO REVIEW THE ERROR

In the *Brief of the Respondent* the State argues that if this Court determines that exceptional circumstances apply to this matter, that the third prong of the plain error test relating to harm also applies and that Kinne and Halls have not shown the harm in this matter. *Brief of Respondent* at p. 8. Although such a showing is unnecessary as it pertains to the preservation rule, the harm in this matter obviously occurred in use of the phrase "obviate all reasonable doubt," which created a substantial risk that a juror would convict based upon a standard of that which is below "beyond a reasonable doubt." The risk creates and evidences the harm since no one can place themselves inside the jury's minds.

No one is capable of accurately predicting if a jury attempted to weigh doubt against the evidence in order to overcome a doubt, or if they were actually convinced that the evidence proved beyond a reasonable doubt that Kinne and Halls committed the crimes charged. Our judicial system stands for the proposition that it is better that a guilty man go free than an innocent man be punished for a crime he did not commit. It is thus better to err on the side of caution and hold that, if the phrase carries a substantial risk with constitutional implications, it does not belong in the courtroom. Because the phrase "obviate all reasonable doubt" carried with it a substantial risk that Kinne and Halls were convicted based upon a standard below beyond a reasonable doubt, no additional harm need be evidenced.

VII. REYES COMPLETELY OVERRULED ROBERTSON

In the *Brief of Respondent*, the State attempts to argue that this Court's ruling in Reyes only overturned the Robertson test and not the jury instruction as set forth in Robertson.

Brief of Respondent at p. 8. Such a determination undermines this Court's decision in Reyes.

At the time of the decision in Robertson, the jury instruction given was acceptable because this Court found that it adequately conveyed the message of "obviate all reasonable doubt" to the jury, even though it did not use that specific phrase. This Court decided in Robertson that the jury instructions needed to convey the idea that the State must "obviate all reasonable doubt." This Court's decision in Reyes overturned the three-prong test portion of Robertson as it specifically pertained to the idea coined with the phrase at issue herein, hence the instruction which conveyed the same idea would necessarily be flawed as well. The decision in Reyes could only correct the error in the law that was created based upon the decision in Robertson. That error of law encompasses both the test and the instruction since both conveyed the idea that the State must "obviate all reasonable doubt."

This Court cannot go back *sua sponte* and give Robertson a new trial based on his instruction. Reyes was not asking to use Robertson's instruction in his matter, but was only asking for the phrase "obviate all reasonable doubt" be used at his trial because the first prong of the test in Robertson indicated that this phrase needed to be used. The State's argument that Reyes did not overturn Robertson's instruction and therefore his reasonable doubt jury instruction is sound makes it appear as though every reasonable doubt jury instruction that has ever been upheld by an appellate court is a sound instruction because they were not specifically addressed by Reyes. Reyes completely overturned Robertson even though it did not specifically address his reasonable doubt jury instruction, which at the time

of his appeal and trial was issued under current law. If Robertson feels as though his instruction is incorrect, then it is his duty to bring that issue before the court, not for this Court to address that issue in Reyes or herein.

VIII. NO ARGUMENT NEED BE ARTICULATED TO CREATE THE SUBSTANTIAL RISK SINCE IT IS INHERENT IN THE USE OF THE PHRASE.

In the *Brief of Respondent* the state attempts to argue that "the prosecutors did not argue that a reasonable doubt must be defined before it could serve as a basis for an acquittal." *Brief of Respondent* at p. 8. The State also cites to the language included in Reyes by this Court that states, "to the extent that the Robertson obviate test would permit the State to argue that it need only obviate doubts that are sufficiently defined, the test works to improperly diminish the State's burden." Reyes at ¶28. *Brief of Respondent* at p. 11.

In the instant matter, although the State did not argue that it need only obviate doubts that were sufficiently defined, the language instructing the jury that "the State must obviate all reasonable doubt" was given and this permitted the State to make such an argument. Because this Court in Reyes determined that the phrase "obviate all reasonable doubt" created a substantial risk, the State did not have to make the argument that they need only obviate doubts that were sufficiently defined because the "obviate all reasonable doubt" phase permitted them to do so. Because Robertson permitted the State to make this argument, this Court overturned Robertson. Therefore, the State did not need to make the argument that the jury obviate doubts that are sufficiently defined, because the phrase

"obviate all reasonable doubt" in the jury instruction created the risk that they could do just that. The risk is in the phrase "obviate all reasonable doubt," so by having the risky phrase in the jury instruction permitted the State to make that argument and the Reyes decision only required that it create a situation in which the State can make that argument, not necessarily that they will.

CONCLUSION

Based upon the foregoing, Kinne and Halls respectfully requests that this Court reverse the decision of the Court of Appeals and remand this matter for a new trial.

DATED this 15th day of February, 2007.

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CERTIFICATE OF MAILING

I hereby certify that on this 15th day of February, 2007, I mailed, first class postage prepaid, true and correct copies of the foregoing Reply Brief to:

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